

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMIT BHARTH,

No. 2:23-cv-0259 DJC AC P

Petitioner,

v.

FINDINGS AND RECOMMENDATIONS

DANNY SAMUEL, Warden,

Respondent.

Petitioner is a California state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The action proceeds on a petition challenging petitioner's 2019 conviction for rape and related offenses. ECF No. 1. Respondent has answered, ECF No. 11, and petitioner has filed a traverse, ECF No. 16.

BACKGROUND

I. Proceedings in the Trial Court

A. The Evidence Presented at Trial¹

1. Prosecution Case

In late January 2017, C.D. was 24 years old and staying at a friend's house in Sacramento. One evening she approached a man, later identified as petitioner, in a parking lot and asked to use

¹ This factual summary is adapted from the opinion of the California Court of Appeal, ECF No. 10-9 at 2-3. The facts are construed in the light most favorable to the judgment.

1 his cell phone. He forced her into his sport utility vehicle (SUV) and drove away. Over the next
2 seven days, they slept in motels or his SUV.

3 Petitioner twice raped C.D. in a motel room. During the week he was with her, he would
4 not let her leave. He beat her, including slapping the back of her head hard and punching her in
5 the face, shoulders, legs, and arms. He hit her with a propane tank, pulled out chunks of her hair,
6 banged her head against parts of the SUV, and attempted to burn her with a blowtorch. On the
7 evening of February 2, 2017, she escaped from the SUV and ran to a nearby business. An
8 employee of that business called 911.

9 When officers arrived at the scene, C.D. was crying and scared. She had serious injuries
10 to her face and back and was taken to the hospital by ambulance. At the hospital, she was crying
11 and restless. She could only partially open her mouth and complained that any movement of her
12 body was painful. Her clothes were ripped and bloody and she was missing large patches of hair
13 on the back of her head. She reported that defendant had forcibly raped her and forced her to
14 orally copulate him. Medical personnel observed severe bruising and swelling on her face as well
15 as numerous bruises and abrasions all over her body. She was unable to open her left eye and her
16 right eye was hemorrhaging. She had nasal bone fractures and a concussion, and her vaginal area
17 was red.

18 On March 2, 2017, C.D. identified petitioner as the perpetrator from a photographic
19 lineup. DNA analysis revealed that petitioner's profile matched the sperm profile on the swabs
20 taken from C.D.

21 2. Defense Case

22 Petitioner testified that he met C.D. in the parking lot on the evening of January 24,
23 2017. He allowed her to use his cell phone and then agreed to give her a ride. After that
24 they hung out together for a week and had consensual sexual intercourse several times.
25 Over the course of the week, they went to various places including casinos, stores,
26 movies, restaurants, parks, and a fitness center. The last time petitioner saw C.D. was the
27 evening of January 31, 2017, when he dropped her off at a Burger King so she could meet
28 up with her grandma.

1 Petitioner denied raping C.D., threatening her, or hitting her. He denied that
2 he forced her into his SUV, or that he forced her to orally copulate him. He did admit that
3 he repeatedly lied to the police when he claimed he did not have sex with her.

4 B. Outcome

5 The jury returned verdicts of guilty on two counts of forcible rape, assault by means of
6 force likely to produce great bodily injury, and false imprisonment. The jury also found true the
7 allegation that defendant personally inflicted great bodily injury.

8 Petitioner was sentenced to a prison term of 23 years and eight months.

9 II. Post-Conviction Proceedings

10 Petitioner timely appealed, and the California Court of Appeal affirmed the judgment of
11 conviction on August 19, 2021. ECF No. 10-9. The California Supreme Court denied review on
12 November 17, 2021. ECF No. 10-11.

13 Petitioner filed no applications for collateral relief in the state courts.

14 STANDARDS GOVERNING HABEAS RELIEF UNDER THE AEDPA

15 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of
16 1996 (“AEDPA”), provides in relevant part as follows:

17 (d) An application for a writ of habeas corpus on behalf of a person
18 in custody pursuant to the judgment of a state court shall not be
19 granted with respect to any claim that was adjudicated on the merits
in State court proceedings unless the adjudication of the claim –

20 (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the
State court proceeding.

22 The statute applies whenever the state court has denied a federal claim on its merits,
23 whether or not the state court explained its reasons. Harrington v. Richter, 562 U.S. 86, 99
24 (2011). State court rejection of a federal claim will be presumed to have been on the merits
25 absent any indication or state-law procedural principles to the contrary. Id. (citing Harris v. Reed,
26 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a

1 decision appearing to rest on federal grounds was decided on another basis)). “The presumption
2 may be overcome when there is reason to think some other explanation for the state court’s
3 decision is more likely.” Id. at 99-100.

4 The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing legal
5 principle or principles” previously articulated by the Supreme Court. Lockyer v. Andrade, 538
6 U.S. 63, 71-72 (2003). Only Supreme Court precedent may constitute “clearly established
7 Federal law,” but courts may look to circuit law “to ascertain whether...the particular point in
8 issue is clearly established by Supreme Court precedent.” Marshall v. Rodgers, 569 U.S. 58, 64
9 (2013).

10 A state court decision is “contrary to” clearly established federal law if the decision
11 “contradicts the governing law set forth in [the Supreme Court’s] cases.” Williams v. Taylor, 529
12 U.S. 362, 405 (2000). A state court decision “unreasonably applies” federal law “if the state
13 court identifies the correct rule from [the Supreme Court’s] cases but unreasonably applies it to
14 the facts of the particular state prisoner’s case.” Id. at 407-08. It is not enough that the state court
15 was incorrect in the view of the federal habeas court; the state court decision must be objectively
16 unreasonable. Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

17 Review under § 2254(d) is limited to the record that was before the state court. Cullen v.
18 Pinholster, 563 U.S. 170, 180-181 (2011). The question at this stage is whether the state court
19 reasonably applied clearly established federal law to the facts before it. Id. at 181-182. In other
20 words, the focus of the § 2254(d) inquiry is “on what a state court knew and did.” Id. at 182.
21 Where the state court’s adjudication is set forth in a reasoned opinion, § 2254(d)(1) review is
22 confined to “the state court’s actual reasoning” and “actual analysis.” Frantz v. Hazey, 533 F.3d
23 724, 738 (9th Cir. 2008) (en banc). A different rule applies where the state court rejects claims
24 summarily, without a reasoned opinion. In Richter, supra, the Supreme Court held that when a
25 state court denies a claim on the merits but without a reasoned opinion, the federal habeas court
26 must determine what arguments or theories may have supported the state court’s decision, and
27 subject those arguments or theories to § 2254(d) scrutiny. Richter, 562 U.S. at 102.

28 ////

DISCUSSION

I. Petitioner's Confrontation Clause Claim and Pertinent State Court Record

A. Overview

Petitioner’s sole claim for relief is that his rights under the Confrontation Clause were violated by C.D. being “permitted to testify… [while] sitting sideways crouched over in the witness chair with her face covered by her long hair so that the only portion visible to the court and jury was the right side of her face covered by her hair.” ECF No. 1 at 34 (quoting defense motion for mistrial). She was permitted to face away from the defendant; her voice was “extremely low and sometimes undecipherable”; and it would have been impossible for jurors to see her facial expressions or demeanor. *Id.* Petitioner refers C.D.’s positioning on the witness stand as “the accommodation,” and alleges that it was “no different than having a screen placed between her and the jurors.” *Id.* at 34, 37.

Petitioner contends that “the accommodation” violated his confrontation rights in several ways, which can be grouped into three categories: (1) petitioner and his counsel were deprived of the opportunity to see and assess the witness’s facial expressions and tone of voice as she made her accusations on direct examination; (2) jurors were deprived of the opportunity to see and assess the witness’s facial expressions and tone of voice as she made her accusations; and (3) denial of “physical face-to-face confrontation” was impermissible because the reliability of the witness’s testimony was not otherwise assured, her emotional state did not warrant an accommodation, and the necessity for accommodation was not otherwise established. See ECF No. 1 at 2-3 (Table of Contents) and 36-60.

B. Factual Background

23 The complaining witness, C.D., suffered from bipolar disorder, depression, and anxiety.
24 See I CT 187 (defense motion in limine).² She became distressed during her testimony, and after
25 an initial break the prosecutor invited her to sit with her chair turned to face away from counsel
26 table and toward the jury. The defense objected, and the trial court overruled the objection. I RT

²⁸ ² The Clerk's Transcript on Appeal is docketed at ECF Nos. 10-3 through 10-6.

1 214.³ Witness examination continued to be difficult due to C.D.'s fragile emotional state.⁴

2 The next morning the prosecutor moved for a continuance, explaining that C.D. had been
3 up all night having an anxiety attack and did not have her prescription medication, which she had
4 not taken for two days. The prosecutor explained that C.D. had experienced an anxiety attack
5 during direct examination, and that she was in bed sobbing and was "catatonic." I RT 234-235.
6 The continuance was granted, and the defense moved for a mistrial. I RT 239-240; I CT 250-259.
7 C.D. returned to the witness several days later, and the parties agreed that the mistrial motion
8 would be heard following her testimony. I RT 244. Her hair was now in a ponytail, *id.* at 245, so
9 that her face was not obscured on cross-examination. She had to be reminded repeatedly to speak
10 up and to use the microphone. She continued to find it difficult to talk about the events at issue.

11 At hearing on the motion for mistrial,⁵ the defense argued that the jury did not have an
12 adequate opportunity to observe C.D.'s demeanor (including facial expressions) in order to assess
13 her credibility on direct examination. The court described the layout of the courtroom, explaining
14 that the witness was seated at juror height and approximately four or five feet away from the jury
15 box. I RT 358-360. The judge detailed C.D.'s reluctance to testify and her difficulties on and off
16 the stand. He noted that although she was an adult woman, she suffered from certain mental
17 deficiencies and was clearly "suffering trauma as she testified." I RT 367. The court continued:

18 [It's clear to the court that this witness could barely get through
19 these proceedings. She could not look up. She could not look at the
20 defendant. She did not even want to look up and around the
courtroom. She's nervous; frantic; scared; afraid. According to her,
she has to relive this trauma because of the defendant.]

21 So in order to get her testimony out, the court did allow her to turn
22 the chair and did allow her to stay in that position over [defense
counsel's] objection that he couldn't see her in order to just be able
23 to get her testimony out, and get her in a position where she would
at least talk and answer questions.

24
25 ³ The Reporter's Transcript on Appeal (RT) is docketed at ECF Nos. 10-1 and 10-2. C.D.'s
testimony is at I RT 170-231, 249-260 (direct examination), 261-308 (cross-examination), 308
(redirect).

26
27 ⁴ A summary of C.D.'s testimony and a description of her manner of testifying may be found at
ECF No. 10-9 (opinion of California Court of Appeal), pp. 3-6, 7-9.

28 ⁵ The hearing is transcribed at I RT 345-373.

I do find, for the record, that she would have been traumatized even more if she were made to face the defendant. I know that's not the argument, . . . but I'm considering that in the level of trauma that she was going through and distress that she was in. . . .

. . . [T]he jury never said that they couldn't hear the witness. And while she was not facing towards the defendant and she was not facing defense counsel, she was facing towards the back wall that is behind the jury. She [was] facing towards the jury with her head down and her hair in and around her face. So the jury's view of her, while obscured at times, is still a better view than counsel had.

The court reporter is transcribing the proceedings, and . . . we made sure everything was taken down. When the court reporter indicated she couldn't hear the witness, the answers were repeated. And, as [the prosecutor] points out, the jury can get read back too. So the substance of her testimony, if not heard at certain points during the trial, the jury can get that in the form of readback of the transcript. And then the manner of her delivery, how she spoke, softly, mumbling, the pauses, the emotions, the turning away, they get the manner of the deliver[y] of the substance of her testimony as well.

So the central concerns of the confrontation clause I'm finding are met. Her physical presence, she was under oath subject to cross-exam, and the observations of her demeanor by the trier of fact. And that's really what this comes down to is what is the definition of observations of her demeanor.

I RT 367-369.

The court noted that while petitioner did not have a full view of C.D.'s face, her hair was not so thick that her face was completely obscured. The court expressly found that "the jury did have enough of a view of her to judge her demeanor." Accordingly, the motion was denied. I RT 371-372.

II. The Clearly Established Federal Law

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." The Confrontation Clause guarantees to a defendant both the right to cross-examine and the right "physically to face those who testify against him." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). While the Supreme Court initially described this right as a "guarantee of face-to-face encounter between witness and accused," Coy v. Iowa, 487 U.S. 1012, 1017 (1988), it later clarified that there is no "absolute right to a face-to-face meeting" but rather a "preference for face-to-face confrontation at trial, which must occasionally give way to considerations of public policy and the necessities of the

1 case.” Maryland v. Craig, 497 U.S. 836, 849 (1990).

2 The central concern of the Confrontation Clause “is to ensure the reliability of the
3 evidence against a criminal defendant by subjecting it to rigorous testing in the context of an
4 adversary proceeding before the trier of fact.” Craig, 497 U.S. at 845. This concern is satisfied
5 when the witness: (1) is physically present for his or her testimony; (2) testifies under oath; (3) is
6 subject to cross-examination; and (4) may have his or her demeanor observed by the trier of fact.
7 Id. at 845-846; see also Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (“[the Confrontation
8 Clause is generally satisfied when the defense is given a full and fair opportunity to probe and
9 expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-
10 examination, thereby calling to the attention of the factfinder the reasons for giving scant weight
11 to the witness’ testimony”); Ohio v. Roberts, 448 U.S. 56, 69 (1980) (oath, cross-examination,
12 and ability to observe demeanor provide “all that the Sixth Amendment demands: ‘substantial
13 compliance with the purposes behind the confrontation requirement’”).

14 Because assessment of demeanor requires direct observation, the Confrontation Clause
15 generally does not permit witnesses at a criminal trial to testify from behind a screen. Coy, 487
16 U.S. 1012. Exceptions to the requirement of physical, face-to-face confrontation are permissible
17 “only where denial of such confrontation is necessary to further an important public policy and
18 only where the reliability of the testimony is otherwise assured.” Craig, 497 U.S. at 850. Under
19 this standard, child abuse victims may be permitted to testify via closed-circuit television upon a
20 showing that the child would be traumatized by testifying in the defendant’s presence and where
21 the child’s testimony remains subject to rigorous cross-examination. Id. at 855-857.

22 III. The State Court’s Ruling

23 This claim was raised on direct appeal. Because the California Supreme Court denied
24 discretionary review, the opinion of the California Court of Appeal constitutes the last reasoned
25 decision on the merits and is the subject of habeas review in this court. See Ylst v. Nunnemaker,
26 501 U.S. 797 (1991); Ortiz v. Yates, 704 F.3d 1026, 1034 (9th Cir. 2012).

27 The Court of Appeal began by thoroughly reviewing the holdings of the U.S. Supreme
28 Court in Coy and Craig, supra, and the leading California cases on the meaning of “face-to-face

1 confrontation," People v. Sharp, 29 Cal. App. 4th 1772 (1994) and People v. Gonzalez, 54 Cal. 4th
2 1234 (2012). ECF No. 10-9 at 14-19. The court continued:

3 As an initial matter, we reject defendant's contention, raised for the
4 first time on appeal, that his confrontation clause rights were
5 violated because the trial court failed to make the case-specific
6 factual findings to justify the accommodation (in the form of
7 permitting her to turn in her chair and face the jury) afforded to the
8 victim, as required under *Craig*.
9

10 Even assuming this argument was preserved for appellate review,
11 we conclude it fails on the merits. Unlike in *Craig*, this case does
12 not involve the denial of face-to-face confrontation. Situations that
13 do not deny such confrontation do not implicate the type of
14 showing required in *Craig*. (*People v. Lord* (1994) 30 Cal.App.4th
15 1718, 1722.)

16 [Footnote: This case does not involve an exception to the
17 right of face-to-face confrontation, as in *Craig*. Thus,
18 defendant's reliance on cases without any face-to-face
confrontation is misplaced. (See, e.g., *Craig, supra*, 497
U.S. at p. 840 [child witness testified outside the
defendant's presence via a one-way closed circuit
television]; *People v. Arredondo* (2019) 8 Cal.5th 694, 699,
709) [adult witness testified behind a computer monitor];
People v. Murphy (2003) 107 Cal.App.4th 1150, 1157-1158
[adult witness testified behind one-way glass]; *Herbert v.
Superior Court* (1981) 117 Cal.App.3d 661, 664-665, 671
[courtroom was arranged in a manner that made it
physically impossible for defendant and witness to see each
other].) We find no merit in defendant's contention that the
victim's use of a soft tone and allowing her hair to partially
cover her face from time to time amounted to the denial of
face-to-face confrontation.]

Indeed, defendant's argument was effectively rejected in *Sharp* and *Gonzales*. There is no meaningful distinction between the victim's refusal to face defendant or defense counsel here and the conduct that was held not to violate the right to confrontation in *Sharp* and *Gonzales*. There is no right to eye contact with the witness as long as the witness is in defendant's physical presence; thus, it was not necessary for the trial court in this case to make the findings (which the defense did not request) required by *Craig*. (See *Gonzales, supra*, 54 Cal.4th at p. 1267; *Sharp, supra*, 29 Cal.App.4th at pp. 1781-1782.) Nonetheless, as we have set forth in detail ante, the trial court did find that the victim would have been traumatized if she were forced to face directly toward defendant based on its own observations of her and the nature of the alleged crimes. There is ample evidence in the record to support that determination. While the trial court did not hear testimony or take evidence on the victim's emotional trauma prior to her testimony, [footnote omitted] detailed findings before a witness testifies are not required when, as here, the record shows that the seating arrangement or other accommodation was fully justified. (See *Arredondo, supra*, 8

1 Cal.5th at p. 709, fn. 4; *Sharp, supra*, 29 Cal.4th at pp. 1783-1784
2 [explicit findings of emotional trauma unnecessary where it was
3 apparent from record that witness was experiencing considerable
4 distress and was unable to participate effectively in the proceedings
5 when seated in the conventional position in the witness box].) Thus,
6 defendant was not deprived of his confrontation clause rights
7 because the trial court allowed the victim to turn in her chair. This
8 minor interference with defendant's line of sight was fully justified
9 given the need to complete the victim's testimony and her
10 documented distress.

11 We also reject defendant's contention that he was deprived of his
12 confrontation clause rights because he, defense counsel, and the
13 jury were unable to hear the victim and observe and assess her
14 demeanor on direct examination. As the trial court found, the record
15 reflects that the important principles underlying the confrontation
16 clause were satisfied here. The victim was physically present in the
17 courtroom during her testimony, testified under oath, and was
18 subject to full cross-examination by counsel and observation by the
19 jury throughout. There was no physical barrier or screen blocking
20 the jury, defendant, or defense counsel from viewing and assessing
21 her demeanor. While the record discloses that her testimony was
22 often difficult to hear because she was bent over in her chair and/or
23 looked down or away from the microphone and spoke softly,
24 defense counsel acknowledged that he could follow along with her
testimony, the trial court asked the victim to repeat inaudible
answers, and no member of the jury indicated they were unable to
hear her testimony at any point. As we have described, the record
also discloses that the victim, for the most part, turned in her chair
and faced toward the jury during her testimony on direct
examination, although she often looked down and her hair
intermittently covered the side of her face. The trial court found that
the victim's hair did not generally cover the front of her face,
although there were times when she looked down and portions of
the front of her face were obscured by her hair. On this record, we
are unpersuaded by defendant's assertion that the victim's conduct
while testifying on direct examination interfered with the jury's
ability to assess her demeanor and draw its own conclusions about
her credibility. The jury could see the victim's general demeanor
and reactions to questioning, including her reaction to the questions
about the alleged rapes and physical abuse. We see no material
distinction between the circumstances of this case and the facts of
Sharp, which we find persuasive and follow here. Accordingly,
because defendant's confrontation rights were not violated, the trial
court properly denied defendant's motion for mistrial. In view of
our conclusion, we need not and do not address defendant's
prejudice argument.

25 ECF No. 10-9 at 19-21.

26 IV. Objective Reasonableness Under § 2254(d)

27 The California Court of Appeal accurately identified the principles of federal
28 constitutional jurisprudence that govern petitioner's claim, and it applied them reasonably. First,

1 it was not objectively unreasonable to conclude that there was no denial of “face-to-face
 2 confrontation” in this case, and that the Craig criteria for an exception to that right are therefore
 3 inapplicable. The U.S. Supreme Court has found that “face-to-face confrontation” is denied when
 4 a witness testifies from different location, as in Craig, or is completely hidden behind a physical
 5 barrier, as in Coy. These situations are easily distinguishable from that presented here. No
 6 clearly established federal law requires the Craig standard to be satisfied before a witness who is
 7 physically present in the courtroom and visible to the jury is allowed to face away from the
 8 defendant in the witness stand. Where no U.S. Supreme Court precedent squarely establishes the
 9 right on which petitioner relies, there can be no unreasonable application of federal law and thus
 10 no federal habeas relief. Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam). And
 11 the failure to extend Supreme Court holdings to novel factual contexts cannot constitute an
 12 objectively unreasonable application of federal law. White v. Woodall, 572 U.S. 415, 426 (2014).
 13 Accordingly, petitioner is not entitled to federal habeas relief on grounds that the trial court
 14 violated his confrontation rights by failing to make certain findings before permitting C.D. to sit
 15 facing away from him.⁶

16 The California Court of Appeal also reasonably decided the question whether petitioner’s
 17 confrontation rights were substantively violated by the circumstances of C.D.’s testimony: her
 18 refusal to look at petitioner, her posture, the hair partially obscuring her features, her “inaudible”
 19 voice. The U.S. Supreme Court has specifically stated that the Confrontation Clause does not
 20 require eye contact between witness and defendant. Coy, 487 at 1019-1020. And no U.S.
 21 Supreme Court decision has found a Confrontation Clause violation based on the manner of
 22 ////

23

24 ⁶ Because no Craig showing was required, permitting the witness to turn her chair away from
 25 defendant was within the trial court’s discretion subject to state law parameters that provide no
 26 grounds for federal habeas relief. See Mullaney v. Wilbur, 421 U.S. 684 (1975) (“state courts are
 27 the ultimate expositors of state law”). The Court of Appeal’s affirmation of the trial court’s ruling
 28 on the matter is therefore not reviewable in federal habeas. See Lewis v. Jeffers, 497 U.S. 764,
 780 (1990). Accordingly, the undersigned does not address petitioner’s arguments about whether
 the “accommodation” was “warranted.”

1 testimony of a witness who was physically present in the courtroom and visible to the jury.⁷
 2 Section 2254(d) therefore precludes relief. See Wright, 552 U.S. at 125-26; White, 572 U.S. at
 3 426. Petitioner's reliance on general confrontation principles does not avail him, as the latitude
 4 afforded state courts under § 2254(d) is greatest where the principles relied on by petitioner are
 5 general. See Renico v. Lett, 559 U.S. 766, 776 (2010). The California Court of Appeal
 6 distinguished Coy and Craig on their facts, with reference to the record in this case, and the
 7 distinctions it drew—between presence in and absence from the courtroom, and between physical
 8 barriers and the intermittent obscuring of a face by hair—are far from “objectively unreasonable.”

9 Finally, the state appellate court found that the jury had sufficient opportunity to observe
 10 C.D.'s demeanor and an adequate basis to evaluate her testimonial credibility, satisfying the core
 11 concerns of the Confrontation Clause. Petitioner makes no argument that the denial of his claim
 12 in state court was based on objectively unreasonable factual findings by the trial court or the
 13 Court of Appeal. See 28 U.S.C. § 2254(d)(2). The state courts' factual findings are presumed to
 14

15 ⁷ Neither has petitioner identified any lower court authority finding a Confrontation Clause
 16 violation on analogous facts. Lower federal court decisions may serve as persuasive authority in
 17 determining what law has been clearly established by the United States Supreme Court and the
 18 reasonableness of a particular application of that law. Hurd v. Terhune, 619 F.3d 1080, 1085 (9th
 19 Cir. 2010). Respondent has identified numerous decisions finding no Sixth Amendment
 20 violation, or no unreasonable application of federal law in a state court finding of no Sixth
 21 Amendment violation, when a witness testifies while facing away from the accused or with their
 22 face partially obscured: e.g., Ellis v. United States, 313 F.3d 636, 646-53 (1st Cir. 2002) (child
 23 witness testified in a chair facing the jurors but facing away from the defendant); Morales v.
Artuz, 281 F.3d 55, 59 (2d Cir. 2002) (key witness testified while wearing dark sunglasses);
Smith v. Graham, 2012 WL 2428913, at *8 (S.D.N.Y. May 7, 2012) (witness testified while
 24 wearing a disguise, a wig and fake beard); United States v. Levenite, 277 F.3d 454, 465 (4th Cir.
 25 2002) (defendants could not see the faces of witnesses testifying against them due to number of
 26 defendants at trial and size of courtroom); United States v. Iron Moccasin, 878 F.2d 226, 230 (8th
 27 Cir. 1989) (easel blocked defendant's view of witness); Spencer v. Yates, 2011 WL 2118862, at
 28 *7 (E.D. Cal. May 8, 2011) (left side of witness's face was shielded from view of defendant);
Bailey v. Woodford, 2010 WL 4702348, at *24 (C.D. Cal. Oct. 8, 2010) (witness's back was
 turned to defense counsel and defendant); Fuson v. Tilton, 2007 WL 2701201, *13-*14 (S.D. Cal.
 Sep. 10, 2007) (witness testified while shielding her face from petitioner), aff'd, 305 Fed. Appx.
 425 (9th Cir. 2008). ECF No. 11 at 26, 27-28 n.1, 29. These decisions and the numerous similar
 state court decisions cited by respondent empirically demonstrate that fair minded jurists can and
 do disagree with petitioner's urged application of Confrontation Clause jurisprudence. This state
 of the law definitively precludes relief under § 2254(d). See Yarborough v. Alvarado, 541 U.S.
 652, 664 (2004) (where fair-minded jurists can disagree, § 2254(d) bars federal habeas relief).

1 be correct, 28 U.S.C. § 2254(e)(1), and in this case the pertinent findings are well supported by
2 the record. In light of these findings—that C.D. sat relatively close to the jurors and faced them,
3 that no physical barrier obstructed the jury’s view of her as she testified, that her face was only
4 intermittently and partially obscured by her hair, that she repeated answers when asked by the
5 court reporter and no juror indicated difficulty hearing her, along with the indisputable facts that
6 she testified under oath and was thoroughly cross-examined—it was perfectly reasonable of the
7 California Court of Appeal to conclude that the jury had a full and fair opportunity to assess her
8 credibility and the Confrontation Clause was thus satisfied. See Craig, 497 U.S. at 845;
9 Fensterer, 474 U.S. at 22; Roberts, 448 U.S. at 69.

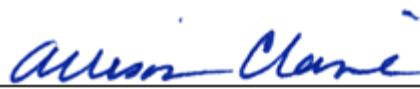
10 For all these reasons, the state courts’ denial of petitioner’s claims was not objectively
11 unreasonable within the meaning of 28 U.S.C. § 2254(d). Federal habeas relief is therefore
12 unavailable.

13 CONCLUSION

14 Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas
15 corpus be denied.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. §636(b)(1). Within twenty-one days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
21 he shall also address whether a certificate of appealability should issue and, if so, why and as to
22 which issues. See 28 U.S.C. § 2253(c)(2). Any reply to the objections shall be served and filed
23 within fourteen days after service of the objections. The parties are advised that failure to file
24 objections within the specified time may waive the right to appeal the District Court’s order.
25 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 DATED: November 20, 2024


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE